



## **PAROLE REVOCATION HEARING**

### **A Primer for Assigned Counsel**

#### **Working Group on Pro Bono Attorney Training Materials— Parole Revocation Hearing**

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## CHAPTER 1

### ASSIGNMENT

You have been assigned to represent an indigent defendant who has been charged with a violation of parole under The Parole Act, N.J.S.A. 30:4-123.45 to -123.76. In Bolyard v. Berman, 274 N.J. Super. 565 (App. Div.), certif. denied, 138 N.J. 272 (1994), the Appellate Division held that it was constitutionally permissible to assign private counsel to represent indigent defendants at parole revocation hearings. Since that time, counsel for indigent parolees has been assigned from a list of private attorneys maintained by the Administrative Office of the Courts. The purpose of this chapter is to explain how you were assigned a *pro bono* case.

In Madden v. Delran, 126 N.J. 591 (1992), the Supreme Court reaffirmed the bar's duty to represent indigent defendants without pay where the Legislature has made no provision for the Public Defender to represent defendants who are entitled to counsel. The Court recognized that it was placing a burden on the bar which should be more generally shared by the public at large. The Court said: "We realize it is the bar that is bearing the burden . . . . We trust that the bar understands the strong policy considerations that have persuaded us. As has so often been the case, it is the bar that makes the system work, often without compensation." Id. at 614.

An attorney admitted in New Jersey is responsible for mandatory *pro bono* service unless he or she fits within one of the exemption categories established by the Supreme Court. Currently there are 11 exemption categories numbered 81-91. Most of these categories relate to various kinds of government service, but there are also exemptions for retired attorneys (exemption code 86),

attorneys who do other types of *pro bono* service (exemption code 88), and out-of-state attorneys (exemption code 90). As part of the annual attorney registration each spring, attorneys are asked to fill out the *pro bono* questionnaire, where they certify their exemption status.

Attorneys are assigned *pro bono* cases through the *pro bono* computer system which was developed and is currently maintained by the Administrative Office of the Courts. The Supreme Court in Madden chose the current system of *pro bono* assignments in an effort to spread the burden among as many attorneys as possible. The system maintains a list of attorneys eligible for *pro bono* assignment for each county. The attorneys are in the order mandated by the Supreme Court in Madden; that is, the attorneys are ordered by the number of *pro bono* cases the attorney has done in the past and then alphabetically. So, at the top of the list are the attorneys who have never done a *pro bono* case, arranged in alphabetical order. Next on the list are attorneys who have only done one case, arranged in alphabetical order, etc. Attorneys are called upon whenever their name reaches the top of the list. The number of *pro bono* cases an attorney is required to undertake depends on the number of attorneys in the county and the number of *pro bono* assignments in that county.

When the county *pro bono* coordinator needs to assign a *pro bono* case, he or she requests a name and the computer generates the next name on the list. Attorneys are not required to do a certain number of hours per year. Rather, attorneys are required to complete an assigned *pro bono* case, no matter how many hours that may require.

The *pro bono* attorney who handles the parole revocation hearing will also be required to represent the indigent client in any administrative appeal of the Board panel's decision to the full Parole Board. R. 2:7-2(d) governs the extent of the *pro bono* attorney's obligation on appeal to the Appellate Division. The rule provides:

Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

**CHAPTER 2**  
**THE CONSTITUTIONAL BASIS FOR A PAROLE REVOCATION**  
**HEARING IN NEW JERSEY**

The United States Supreme Court has ruled that before a defendant's parole may be revoked, he or she must be accorded certain due process rights.

**1. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).**

In Morrissey, the Court held that since revocation of parole was not part of a criminal prosecution, the due process clause does not demand that a defendant be given the full panoply of rights. However, since the parolee is facing a loss of liberty, he or she is entitled to "some orderly process, however informal." Id. at 482. The Court decided that at a minimum a parolee must be given the following procedural protections. Id. at 485.

**A. Preliminary Hearing.** As promptly as convenient after the parolee is detained, he or she should be given a preliminary hearing "to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Ibid. The parolee shall be given notice of the hearing, explaining its purpose and stating what parole violation has been alleged. Id. at 487. At the hearing, the parolee shall have an opportunity to speak on his or her own behalf and present documents or witnesses. Ibid. Upon the parolee's request, he or she shall have the opportunity to hear the testimony of a person giving adverse information on which the parole revocation is based. Ibid. The hearing officer must be a person other than the supervising parole officer but need not be a judicial officer. Id. at 485-86. The hearing officer shall make a written summary of the hearing. Id. at 487.

**B. Revocation Hearing.** If the hearing officer determines at the preliminary hearing that there is probable cause to revoke parole, the parolee is entitled to another hearing prior to the final decision. Id. at 487-88. This revocation hearing must take place within a reasonable time after the parolee

has been taken into custody, and “it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation”. Id. at 488. The Court held that the minimum requirements of due process demanded that the revocation hearing included the following protections:

(a) [W]ritten notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

[Id. at 489.]

The Court explicitly did not reach the question of whether a parolee was entitled to the assistance of retained counsel or, if the parolee was indigent, appointed counsel. Ibid.

## **2. Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).**

Within a year of its decision in Morrissey, the Court returned in Gagnon to the question of whether a parolee or probationer has a right to counsel at a revocation of probation or parole hearing. It held that the right to assigned counsel in such proceedings must be determined on a case-by-case basis in the exercise of sound discretion by the state agency charged with responsibility for administering the parole and probation system. Id. at 790. The Court stated

that, in general, counsel should be assigned where the defendant requests counsel and asserts a colorable claim that he or she has not committed the alleged violation or that there are substantial mitigating circumstances that make revocation inappropriate. Ibid. Especially in doubtful cases, the state agency should consider the ability of the defendant to speak effectively on his or her own behalf. Id. at 790-91.

### **3. Bolyard v. Berman, supra, 274 N.J. Super. 565.**

The Public Defender Act requires the Office of the Public Defender (Public Defender) to provide legal representation to indigent parolees charged with violations of parole. Id. at 569. Nonetheless, in 1991 the Legislature declined to appropriate money to fund the legal representation of parolees before the Parole Board. Ibid. In response, the Public Defender announced that it would no longer be able to provide representation to parolees charged with violations of parole. Id. at 570. To provide the assigned counsel required by Gagnon, the Parole Board developed a system whereby parolees entitled to counsel would be provided private attorneys assigned from the Madden v. Delran list. Id. at 572.

In Bolyard, plaintiffs challenged the system of assigning members of the private bar to represent parolees, arguing that Gagnon required the Legislature to restore funds to the Public Defender to perform this responsibility. Id. at 568. Judge Stephen Skillman, writing for the Appellate Division, rejected this challenge by holding that the system of assigning private counsel to defendant parolees at parole revocation hearings was constitutionally adequate. Id. at 585.



**CHAPTER 3**  
**THE STATUTES AND REGULATIONS THAT GOVERN THE HEARING**  
**PROCESS IN NEW JERSEY**

**1. Preliminary Hearing—N.J.S.A. 30:4-123.62; N.J.A.C. 10A:71-7.4 to 7.10**

A parolee who has “seriously or persistently violated the conditions of his parole” or who has been convicted of a crime while on release may have his parole revoked. N.J.S.A. 30:4-123.60; N.J.S.A. 30:4-123.60(c). Hobson v. New Jersey State Parole Board, 435 N.J. Super. 377 (App. Div. 2014).

A parolee who has been taken into custody for an alleged violation of parole shall have a preliminary hearing within 14 days, unless a postponement is requested. That postponement must not exceed 14 days. N.J.S.A. 30:4-123.62 (b); N.J.A.C. 10A:71-7.4 to -7.5. The purpose of the preliminary hearing is to determine whether there is probable cause to believe the parolee has violated the conditions of parole and should be returned to custody. N.J.S.A. 30:4-123.62(c); N.J.A.C. 10A:71-7.4. A preliminary hearing may be conducted by videoconference. N.J.A.C. 10A:71-7.5(b). The hearing officer shall be an impartial official who is not directly involved in supervising the parolee or otherwise involved in the parolee’s case. N.J.A.C. 10A:71-7.6(b).

Before the hearing, the parolee is to be provided with written notice of the hearing and the circumstances of the alleged violation. N.J.S.A. 30:4-123.62(d); N.J.A.C. 10A:71-7.7. At the hearing, the parolee has a right to retain counsel or counsel may be appointed from the *pro bono* assignment program when the parolee makes a colorable claim that he or she did not commit the violation or that there are substantial mitigating factors. N.J.S.A. 30:4-123.62(d); N.J.A.C. 10A:71-7.7(c) (2). The parolee also has the right to confront and cross-examine witnesses, to remain silent, to testify on his or her own behalf, and to present documentary evidence. N.J.S.A. 30:4-123.62(d); N.J.A.C. 10A:71-7.7(c). The hearing officer is to make a summary of the record and forward it to the parolee and the parolee’s attorney. N.J.S.A. 30:4-123.62(e); N.J.A.C. 10A:71-7.10.

If the evidence at the preliminary hearing does not establish probable cause to believe that the parolee violated a condition of parole or does not establish that revocation is desirable, the parolee may then be released. N.J.S.A. 30:4-123.62(f). If the evidence presented at the preliminary hearing does establish probable cause to believe the parolee violated a condition of parole, the hearing officer shall determine whether the parolee should be retained in custody. N.J.S.A. 30:4-123.62(g).

## **2. Revocation Hearing—N.J.S.A. 30:4-123.63; N.J.A.C. 10A:71-7.12 to 7.18**

If a parolee is retained in custody after the preliminary hearing, then a revocation hearing shall be conducted within 60 days of the date the parolee was taken into custody unless a postponement, which must not exceed 120 days, is requested. N.J.S.A. 30:4-123.63(a); N.J.A.C. 10A:71-7.12 to -7.13. The parolee shall be given written notice of the hearing. N.J.S.A. 30:4-123.63(b); N.J.A.C. 10A:71-7.14. At the hearing, the parolee has the right to representation by an attorney or other person the parolee chooses, or, if the parolee is indigent, the right to an attorney appointed under the *pro bono* assignment program, if the parolee makes a colorable claim that he or she did not commit the violation or that there are substantial mitigating factors. N.J.S.A. 30:4-123.63(b); N.J.A.C. 10A:71-7.14. The parolee also has the right to: (1) remain silent; (2) confront and cross-examine witnesses; (3) rebut documentary evidence; (4) testify; (5) present evidence; and (6) subpoena witnesses (providing a prima facie showing is made that witness will provide material testimony). N.J.S.A. 30:4-123.63(b); N.J.A.C. 10A:71-7.14. The hearing officer shall record the revocation hearing by an electronic recording device and prepare a written summary of the hearing and the reasons for the officer's opinion. N.J.S.A. 30:4-123.63(c); N.J.A.C. 10A:71-7.16. The parolee or his or her attorney may object to or comment on the hearing summary by submitting written exceptions. N.J.A.C. 10A:71-7.16(b) (2).

At the hearing, the Board must prove by clear and convincing evidence that the parolee “has seriously or persistently violated the conditions of parole,” N.J.S.A. 30:4-123.60(b); N.J.S.A. 30:4-123.63(d) or that the person was convicted of a crime while released, N.J.S.A. 30:4-123.60(c); Hobson v. New Jersey State Parole Board, supra, 435 N.J. Super. at 382. In Hobson, the Appellate Division held that testimony that the parolee possessed a green vegetative substance that was packaged as CDS was not clear and convincing evidence that the parolee had violated a parole condition that he refrain from using CDS. Id. at 389. Further, the Appellate Division held that the parolee’s admission that he had drank two shots of rum did not demonstrate by clear and convincing evidence that the parolee had “seriously or persistently” violated a special condition that he not drink alcohol. Id. At 390. The Appellate Division, therefore, reversed and vacated the Board’s revocation of the parolee’s release status. Id. At 390-91.

If the hearing officer finds by clear and convincing evidence that the parolee has violated parole and that it is desirable to return the parolee to custody, the Board panel may revoke parole and return the parolee to custody. Hobson v. New Jersey State Parole Board, supra, 435 N.J. Super. at 382. In the alternative, the Board panel may issue an order continuing or modifying parole and releasing the parolee. N.J.S.A. 30:4-123.63(d).

Within 21 days after the hearing, the parolee shall be informed in writing of the decision, the reasons for it, and the facts on which it was based. N.J.S.A. 30:4-123.63(e); N.J.A.C. 10A:71-7.18.

## CHAPTER 4

### PAROLE REVOCATION HEARINGS

#### **Historical Background/Overview**

In most states, parole is solely within the discretion of a parole agency and is granted only after an inmate completes a portion of his or her sentence. Parole is intended to help the inmate reintegrate into society as a constructive individual without the necessity of confinement for the full term of the sentence imposed. It also serves to ameliorate the costs to society of keeping an individual in prison. The granting of parole depends upon a determination that convicted persons can now safely rejoin the society whose rules they have broken. In New Jersey, there are essentially three types of parole release that an offender may be subject to: (1) the traditional parole granted to an offender who has completed service of the punitive portion of the term of incarceration (either 1/3 of the total term less applicable work and commutation credit or a mandated period of parole ineligibility); (2) a period of “mandatory parole supervision” following the service of a custodial term for a prescribed 1<sup>st</sup> or 2<sup>nd</sup> degree offense pursuant to N.J.S.A. 2C:43-7.2; or (3) the special sentence of Parole Supervision for Life imposed by the court upon conviction of an enumerated offense pursuant to N.J.S.A. 2C:43-6.4.<sup>1</sup> However, regardless of the type of supervision the offender is subject to, the parole revocation procedures employed are identical and vary only with respect to final dispositions.

The procedures employed in the revocation of parole are dictated by the constitutional precepts as articulated in the landmark U.S. Supreme Court decision of Morrissey v. Brewer, *supra*, 408 U.S. 471. Morrissey, decided on June 29, 1972, triggered a new era in the field of corrections and parole procedures. Speaking for the Court, Mr. Chief Justice Burger concluded that the liberty of a parolee included many of the core values of unqualified liberty and

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<sup>1</sup> There is a fourth parole status known as Community Supervision for Life; however, as that particular status is not subject to the administrative parole revocation process, it is omitted from this discussion.

that the termination of that liberty required an informal hearing to give assurance that a parole violation leading to revocation would be based on verified facts. In this landmark decision, the Court rejected the "right vs. privilege" distinction and held that parole was something more than a mere privilege to be extended or withdrawn at the state's whim. Chief Justice Burger wrote that society had a stake in the conditional liberty enjoyed by the parolee because such liberty afforded society an opportunity to restore the parolee to a normal and useful life within the law. Also, society had a further interest in treating the parolee with basic fairness, as fair treatment in parole revocation proceedings would enhance the chance of rehabilitation by avoiding reactions to arbitrariness. The Court ruled that states have no justifiable interest that would necessitate the revocation of parole without affording the parolee minimal procedural safeguards.

Having made this determination, the Court turned to a consideration of just what procedures would apply in the parole revocation process. The Court noted that there were few absolute procedures mandated by due process and that procedures should be tailored to the needs of each situation. The underlying goal of procedural due process is to assure that the proceedings afford the individual fundamental fairness. Hence, the essence of due process is fairness, and the competing interests of the parolee and of the state must be weighed in order to determine the appropriate procedures.

According to Morrissey, continuing liberty is the primary interest of the parolee. On the other hand, since the parolee has already been convicted of a criminal offense, the state has an overwhelming interest in being able to return the unsuccessful parolee to an institutional setting without the burden of having to conduct a new adversarial criminal proceeding. By balancing these competing interests, the Court was able to identify the minimum procedural protections which should apply.

The Court identified two important stages in the typical parole revocation. The first stage occurs when the parolee is arrested and detained, often at the discretion of his parole officer. The second occurs when parole is formally revoked. The Court reasoned that due process would seem to require that some

minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest, and as promptly as is convenient after arrest while information is fresh and sources are available. This inquiry would be in the nature of a preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. In addition to this preliminary hearing, the Court concluded that there must also be an opportunity for a hearing prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than a determination of probable cause, it must lead to a final evaluation of any contested relevant facts, and it must invoke consideration of whether the facts as determined warrant revocation.

Both the preliminary hearing, commonly referred to as the probable cause hearing, and the revocation hearing are to be governed by six basic and minimum due process protections. These six requirements are: (1) written notice of the claimed violations of parole; (2) disclosure of evidence against the parolee; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and the reasons for the action taken. The Court was careful to emphasize that flexibility and informality were important aspects and that the above requirements should not impose a great burden on any state's parole system. In New Jersey, the Parole Act of 1979 and the Administrative Code regulations codify the parole revocation procedures and incorporate the Morrissey due process concepts.

The Morrissey decision did not address the issue of the parolee's right to the assistance of counsel, instead leaving this question unanswered until May, 1973, in the case of Gagnon v. Scarpelli, supra, 411 U.S. 778. The Gagnon decision establishes a conditional right to counsel. The attorney determination is

to be made on a case-by-case basis with the overriding standard being "fundamental fairness". Basically, Gagnon held that in some situations fundamental fairness requires the assistance of counsel, but left this decision to the parole authorities based on the exercise of "sound discretion".

The initial determination regarding whether counsel should be appointed is generally made when the offender is served with formal notice of the preliminary hearing. However, the ultimate responsibility rests with the assigned hearing officer to ensure that an adequate attorney determination was made and that the determination conforms to the flexible standard of Gagnon. This responsibility does not require a formal review of the attorney determination; indeed, only that the hearing officer be aware of the problems involved and take the necessary remedial steps in situations where counsel is clearly necessary.

The Gagnon decision establishes two primary factual situations, creating a rebuttable presumption that the parolee has the right to be represented by counsel. First, a parolee may make a "colorable claim" of innocence of the violation charged. The validity of this claim depends on the plausibility of the claim, whether there had been any admission of guilt, or a prior finding of guilt making the claim of innocence frivolous. Second, a parolee may admit guilt, but still claim substantial mitigating factors. The validity of the claim depends on the extent of the mitigating factors, whether they might affect the revocation decision, and whether they are complex or difficult to present.

Generally, if neither of the above presumptions are established, counsel will be denied. On the other hand, if either of the presumptions are established counsel will usually be provided. However, as fundamental fairness is the ultimate standard, the presumptions can be overcome by considering the totality of the circumstances. Other considerations such as age, intelligence, criminal experience, ability to communicate, and complexity of case must be considered and may require that counsel be provided without the above criteria being fulfilled or that counsel be denied even though the presumptions are present. Essentially, the presumptions control unless there are special considerations to override or rebut them.

It should also be remembered that the parolee must make a timely request for counsel. Once the parolee has waived the right to counsel, the parolee may not retract the waiver provided it was a knowing and voluntary waiver and no new factors are present. It is the responsibility of the assigned hearing officer to determine that a waiver was knowing and voluntary. The hearing officer must be satisfied that the parolee knew what rights were available, the consequences of the waiver, that he had the capacity to make the decision, and that the waiver was made by free choice and not based on coercion or misunderstanding.

Once a determination is made that counsel should be assigned, the matter is referred to the appropriate office for the appointment of counsel by the Assignment Judge in the vicinage where the parolee's hearing shall be conducted.



## **CHAPTER 5**

### **DISCOVERY / SCHEDULING**

**1. Discovery Requests:** Your assignment order should provide the local contact information for the District Parole Office Supervisor to obtain your discovery materials (see also Appendix A – Resources for telephone numbers of Parole Board District Offices). The assignment order will also indicate the custody location of the parole violator, whether it is a county jail facility, state prison, or other custody location. Revocation hearings may also be scheduled in the District Parole Office when the parole violator has been permitted to remain at liberty pending the outcome of the parole revocation hearing. Upon contacting the District Parole Office you may be referred to an alternate supervising parole office as different offices handle particular types of parole supervision, such as sex offender supervision, electronic monitoring/home confinement supervision, or community treatment program supervision. At the initial parole office contact, defense counsel may request a copy of the discovery materials, which is the revocation hearing documentation that has also been provided to the parole violator.

**2. Discovery Materials:** The discovery package will minimally include the following:

a) Notice of Probable Cause Hearing and accompanying list of parole violation charges to be addressed at the revocation hearing. Included on the Violation Notice will be information on the date of parole, commitment offense and sentence, and “end of supervision” date commonly known as the max date. The state prison and State Bureau of Identification (SBI) numbers, two State Parole Board tracking numbers used to identify all cases under parole supervision, will be included. Any correspondence should include at least one of the two available tracking numbers for identification purposes. The Notice will indicate the custody location of the revocation hearing and will indicate that the date and time of the hearing “will be determined”.

b) Special Parole Reports, which are the reports submitted by the assigned parole officer such as Arrest Reports (indicating how the parole violator was returned to custody), Missing Reports (indicating absconding information), and Disposition Reports (indicating the outcome of court hearings for charges that occurred while under parole supervision).

c) Chronological Supervision Reports are the parole supervision entries recorded by the assigned officer at the time of all significant supervision contacts, resulting in the violations charged in the Notice of Violation. The chronological record is the contemporary supervision record of events detailing the supervision contacts and decisions made concerning the parole violation charges.

d) The Parole Supervision Certificate is the Certificate of Parole issued by the State Parole Board prior to being released from the state or county institution. The Parole Certificate indicates the sentence information, the general conditions of parole (conditions directed by administrative regulation), and special conditions of parole (conditions directed by the State Parole Board). The parole violation charges on the Notice of Violation refer specifically to violations of the general or special conditions noted on the parole certificate.

**3. Interview:** Upon receipt of the discovery materials, counsel may elect to interview the offender at the county or state correctional facility. It is recommended for counsel to contact the jail in advance to review the institutional regulations for appropriate dress, recording devices, and interview hours. Counsel must have valid identification before being permitted in the correctional facility.

**4. Scheduling:** When defense counsel is prepared to proceed, the supervisor of the District Parole Office handling the revocation matter is to be contacted for scheduling of the Probable Cause Hearing.

## **CHAPTER 6**

### **THE HEARING**

Upon an offender's release to parole supervision, he or she agrees to abide by general conditions of parole plus any special conditions of parole that may be imposed by either a Board panel or by the Division of Parole. Under the precepts of Morrissey, supra, 408 U.S. 471, once a parolee is taken into custody for alleged violations of parole he or she will be scheduled for a probable cause hearing. The probable cause hearing is in the nature of a "preliminary hearing" to determine if there is probable cause to believe that a violation of the conditions of parole has occurred. It is a limited inquiry to discover whether there is a factual basis warranting detention of the parolee pending the outcome of the parole revocation hearing and whether there are reasonable grounds to believe that the arrested parolee has committed acts constituting a violation of parole.

The burden of proving that probable cause exists is placed upon the state. Although the parolee has a right to offer evidence on his or her own behalf, there is no affirmative obligation to disprove the allegations. At such a hearing, the parolee generally has no right to introduce mitigating circumstances unless such circumstances are so intertwined with the violation that they cannot be distinguished from or unless the parolee wishes to waive the probable cause hearing and proceed directly to the parole revocation hearing (discussed infra).

#### **Procedural Requirements**

Morrissey indicated that the probable cause determination should be made by someone not directly involved with the case. It is sufficient in the probable cause hearing context that the individual conducting the hearing be someone other than the parole officer who made the report of parole violations or recommended parole revocation.

To satisfy due process requirements, the parolee must be given adequate notice that the probable cause hearing will take place. Such notice should

include the time and date of the hearing, its purpose, and the parole violations which have been alleged.

Under Morrissey the parolee is guaranteed the right to appear and to be heard on his or her own behalf and is entitled to present evidence in the form of letters and documents. The parolee may also bring forward witnesses who can provide relevant information to the hearing officer. The only evidence admissible at the probable cause hearing is that which is pertinent to the charged violation(s). In cases where a person has given adverse information on which parole revocation is to be based, the parolee has the right to have that person made available for questioning at the hearing. The Court in Morrissey placed the responsibility of producing an adequate record of the hearing on the hearing officer.

## **Scheduling**

Upon receipt of your appointment letter, you should immediately contact the local District Parole Office in order to receive a copy of the Notice of Probable Cause Hearing and the Disclosure of Evidence (“discovery”). At that time, you may also choose to schedule a mutually-convenient hearing date. You may ask for a continuance because of calendar conflicts. While such requests are liberally granted, please keep in mind that your client will remain in continued custody without bail pending the hearing process.

When appointed counsel fails to appear at the hearing, efforts will be made to contact the attorney and determine why he or she is not present. At this point, the hearing officer may: (1) proceed without counsel, if the parolee wishes to do so; (2) continue the matter to another date when counsel can be present, if counsel's absence is excusable; or (3) retain or have a new attorney appointed and a new date set. If appointed counsel is absent without justification, the matter may be referred back to the Assignment Judge for appropriate action.

## **Initiating the Hearing Process**

Prior to taking testimony at the hearing, the hearing officer will explain the bifurcated structure of the hearing process (preliminary hearing v. revocation hearing) and will review the parolee's hearing rights. The hearing officer will also answer any questions that the attorney may have regarding the differences between a formal criminal proceeding and this administrative hearing (i.e. that generally the formal Rules of Evidence do not apply at administrative hearings).

## **Probable Cause Hearing v. Parole Revocation Hearing**

If all of the State's witnesses are present and accounted for, the parolee may choose to waive the probable cause hearing and proceed directly to the parole revocation hearing (barring any objection on behalf of the State to produce additional testimony or evidence at the parole revocation hearing). As most revocation hearings involve only the testimony of the assigned parole officer in detailing the alleged parole violations, it is often desirable to proceed with the parole revocation hearing at this juncture rather than to wait an additional time period in order to reconvene the revocation hearing to hear testimony from the same witness regarding the same allegations (assuming that probable cause is either established or stipulated). If the probable cause hearing is waived and the matter proceeds as a parole revocation hearing, the only difference from an evidentiary standpoint is that the State must prove the allegations by clear and convincing evidence (rather than a mere showing of probable cause ).

Whether the matter proceeds as a probable cause hearing or as a parole revocation hearing, the following procedures will be followed by the hearing officer unless noted otherwise:

If the parolee or the attorney makes specific objections, the hearing officer will allow the objections to be fully stated prior to the beginning of the evidentiary phase of the hearing. The hearing officer may rule on each objection as it is made or note the objection for the record and hold the final ruling to a later stage of the hearing process. A particularly difficult objection may necessitate a brief recess in order to allow the hearing officer to obtain assistance in making a

ruling. If a preliminary objection is significant enough to warrant a continuance, the hearing officer will be aware of this fact early in the proceedings. The hearing officer may require the parolee or the attorney to put a lengthy series of objections in writing.

The hearing officer will place all witnesses under oath prior to receiving their testimony. The oath will be administered to all parties present at the beginning of the hearing. Other witnesses will be placed under oath at the time they are called. The attorney, as an officer of the court, should not be placed under oath unless he or she will be giving testimony. If the attorney declines to take the oath, but later begins to give testimony as opposed to merely asking questions or commenting upon the evidence, the attorney shall then be placed under oath.

### **Evidentiary Phase**

After administering the oath, the hearing officer will recite each alleged violation of parole and ask the parolee for a denial, an admission, or admission with an explanation. If the parolee denies the alleged violation of parole, the hearing officer will ask the parole officer (or other relevant witness) to testify regarding the relevant facts surrounding any contested violation(s). Upon conclusion of the parole officer's (or other relevant witness's) testimony, the parolee and/or attorney may cross-examine the parole officer (or other relevant witness).

If the parolee admits to the parole violation(s) with an explanation, the hearing officer will allow the parolee an opportunity to provide his or her explanation as to why the parole violation occurred and to submit evidence of any relevant mitigating circumstances surrounding the parole violation. Upon conclusion of the testimony, the hearing officer will ask the attorney for any closing statements.

The hearing officer will then ask for a recommended disposition from the parole officer based upon their supervision history with the offender and in conjunction with the present allegations of violations of parole.

## **Hearing Summary Report**

Upon conclusion of the hearing, the hearing officer will prepare a written summary based on the evidence presented. The hearing summary report will also include a factual determination from the hearing officer regarding whether the standard of evidence has been met by the State.

If the matter proceeded as a probable cause hearing only and a showing of probable cause is made, then the hearing summary report will only contain a recommendation from the hearing officer to either detain the parolee pending the parole revocation hearing or to allow the parolee to be released pending the parole revocation hearing. However, if the matter proceeded as a parole revocation hearing, the hearing summary report will contain a recommendation by the hearing officer as to whether the violations, if found, are either serious and/or persistent and whether parole revocation is desirable.

Within approximately 10-14 days upon conclusion of the hearing, a copy of the hearing summary report will be forwarded to the attorney and the parolee for review. The attorney will have seven days upon receipt of the hearing summary report in which to respond. Within 21 days of the hearing, the hearing officer's summary report will be reviewed by a Board panel for a final determination.

## **Revocation Hearing Dispositions**

Upon review of the hearing officer's summary report, as well as any additional comments provided by counsel, the Board panel will make a final determination in the parolee's case. If the hearing officer makes a finding that the standard of evidence has been met based upon the evidence submitted at the hearing, the determination by the Board panel is whether the violations of parole are either serious and/or persistent and whether revocation is desirable.

If the matter was heard as a probable cause hearing only, the Board panel may either elect to continue the offender in custody pending the parole revocation hearing or may release the offender pending the parole revocation

hearing. If the matter was heard as a parole revocation hearing, the Board panel may either revoke parole and impose a future parole eligibility term or may elect to continue the offender's parole status. If the Board panel elects to continue the offender's parole status, the Board panel may impose special conditions of parole that will assist the offender in reintegrating back into society. Such special conditions may include that the offender participate in a community-based program, participate in either inpatient or outpatient substance abuse or alcohol treatment, participate in the electronic monitoring/home confinement program, or any other special condition that may seek to lessen the likelihood of recurrence of criminal behavior.<sup>2</sup>

### **Notice of Decision**

Regardless of the outcome, the Board panel will issue a written Notice of Decision citing the particular reasons for the decision and the facts relied upon. If parole is revoked, the Notice of Decision will include the future parole eligibility term that has been imposed. If the offender's parole status is continued, the Notice of Decision will include any special conditions of parole that may be imposed by the Board panel.

Any decision of the Board panel may be administratively appealed to the full Board. Accordingly, included in the Notice of Decision will be a notice regarding how the offender may administratively appeal the decision of the Board panel.

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<sup>2</sup> The State Parole Board and its District Parole Offices work in partnership with community-based programs to develop and maintain a continuum of treatment, support services, and supervision that encourage and aid offenders in completing their supervision in the community. For a full listing of such programs, see Appendix A- Resources.



## **CHAPTER 7**

### **ADMINISTRATIVE APPEAL PROCESS**

N.J.A.C. 10A:71-4.1(e) provides that any revocation of parole by a Board panel may be appealed to the Board provided one of the following criteria is met:

- 1) The Board panel failed to consider material facts or failed to document that clear and convincing evidence indicates that the parolee has seriously or persistently violated the conditions of parole;
- 2) The Board panel failed to demonstrate, in the case of parole revoked for other than new criminal convictions, that revocation of parole is desirable;
- 3) The Board panel's decision is contrary to written Board policy or procedure;
- 4) A Board member has failed to comply with the Board's professional code of conduct.

N.J.A.C. 10A:71-4.2 provides in pertinent part:

1. All appeals submitted pursuant to N.J.A.C. 10A:71-4.1 shall be filed in writing and within 90 days of written notice of action or decision being received by the inmate and shall contain the reasons for the appeal and the criteria under which the appeal is submitted.
2. Appeals filed by inmates shall be considered by the Board panel, Board or Chairperson, as appropriate, within 90 days of the date the appeal was received.
3. The Chairperson or Board panel member shall notify the inmate in writing of the decision within 14 days of such decision.

The Board panel, Board, or Chairperson, as appropriate, may affirm, modify, or reverse the decision being appealed, or may remand the case to the Board's staff, hearing officer, Board member, or Board panel for further consideration.

Please be cognizant of the following:

- Pursuant to Board policy, appeals may be accepted out of time only for good cause shown.
- Appeals are considered based on the written record and appeal. There is no oral argument before the full Board.
- If you are representing the inmate in the appeal, you may request the documents in the record by sending a written request to:

Records Custodian  
State Parole Board  
PO Box 862  
Trenton, New Jersey 08625  
Fax at (609) 292-4493

You do not need to file a request pursuant to the Open Public Records Act in order to obtain the records.

- If you wish to obtain a transcript of the parole violation hearing(s), you are required to submit a written request to the Parole Revocation Hearing Unit at:

New Jersey State Parole Board  
Parole Revocation Hearing Unit  
PO Box 862  
Trenton, NJ 08625

You must include the name of the inmate, the inmate's prison number and/or State Bureau of Identification (SBI) number, and the date(s) of the hearing(s). Upon receipt of the request, you will be contacted by an agency representative regarding further procedures.

## **APPENDIX A - RESOURCES**

**New Jersey State Parole Handbook:**

**<http://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf>**

**New Jersey State Parole Reference Guide:**

**<http://www.state.nj.us/parole/docs/RefGuide.pdf>**

**New Jersey State District Parole Offices & State Correctional Facilities:**

**<http://www.state.nj.us/parole/locations.html>**

**New Jersey State Parole Board Community Programs:**

**[http://www.state.nj.us/corrections/SubSites/OCP/OCP\\_RCRP\\_Information.html](http://www.state.nj.us/corrections/SubSites/OCP/OCP_RCRP_Information.html)**

**New Jersey County Correctional Facilities:**

**<http://www.njcjwa.org/jails.html>**